

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

MONSANTO COMPANY and  
MONSANTO TECHNOLOGY LLC,

Plaintiffs,

v.

E.I. DU PONT DE NEMOURS AND CO. and  
PIONEER HI-BRED INTERNATIONAL, INC.,

Defendants.

Case No. 09-cv-0686 (ERW)

**NOTICE CONCERNING THE COURT'S OCTOBER 4, 2011 ORDER ON  
PRIVILEGE CHALLENGES**

Pursuant to this Court's October 4, 2011 Order concerning the parties' final one hundred privilege challenges (Dkt. #910), Defendants submit this notice to provide information requested by the Court and to seek clarification with respect to two documents.

*First*, the Court asked Defendants to show that the document marked as Item 291325 was the document mentioned in Item 240853. (Dkt. #910-2 at 3 n.1.) The email marked as Item 240853 refers to two attachments: "Corn Analysis – Feb 2002.xls" and "Soybean Analysis – Feb. 2002.xls." The spreadsheet marked as Item 291325 is "Corn Analysis – Feb 2002.xls," and the spreadsheet marked as Item 291326 is "Soybean Analysis – Feb 2002.xls." The cover email, Item 240853, explains that both documents were developed at the request of Pioneer in-house counsel Dan Jacobi. Accordingly, all three documents are privileged. *See McDonnell Douglas Corp. v. E.E.O.C.*, 922 F. Supp. 235, 242 (E.D. Mo. 1996); *Williams v. Sprint/United Mgmt. Co.*, 238 F.R.D. 633, 636 n.1, 638-40 (D. Kan. 2006). A copy of Family 240853 is attached as Exhibit A.

*Second*, the Court also requested proof showing that the document marked as Item 463469 was part of the email marked as Item 438185. (Dkt. #910-2 at 5 n.1.) The email marked as Item 438185 contains four attachments, including the document marked as Item 463469. Their filenames and corresponding Item numbers are:

ITEM	FILENAME
463467	OGAT_Corn_QA_010909_v1.doc
463468	OGAT_soy_QA_010709_v6.doc
463469	OGAT_soy_TPs_010709_v6.doc
463470	OptimumGAT_Corn_TP_010909_v2.doc

The metadata for Family 438185 confirms that that the document identified as Item 463469 was originally attached to the cover email identified as Item 438185. (See Ex. B, Decl. of H. Wancjer, at ¶¶ 4-7.) A copy of Family 438185 is attached as Exhibit C.

*Third*, Defendants request clarification regarding the document marked as Item 463470, the last attachment listed above. The Court ruled on three of the five members of its family, and requested information regarding a fourth, but did not state whether Item 463470 was privileged. (Dkt. #910-2 at 5.)

*Fourth*, Defendants also request clarification regarding the March 15, 2002 8:53 am email in the document marked as Item 12517524. The Court held that the first two emails in this document were not privileged and that the last two emails were privileged, but did not address the middle email in the five-email chain. (Dkt. #910-2 at 7 n.7.) Defendants believe that the middle email is privileged because it is a request for legal advice sent from Pioneer businessperson Anthony Cavalieri to in-house Pioneer counsel Louise Foutch, and have redacted it in the documents they are providing to Monsanto. A copy of Item 12517524 is attached as Exhibit D.

Dated: October 14, 2011

Respectfully submitted,

**LEWIS, RICE & FINGERSH, L.C.**

By: /s/ C. David Goerisch  
Andrew Rothschild, #23145MO  
C. David Goerisch, #48418MO  
600 Washington Avenue, Suite 2500  
St. Louis, Missouri 63101  
(314) 444-7600  
(314) 241-6056 (facsimile)  
arothschild@lewisrice.com  
dgoerisch@lewisrice.com

Leora Ben-Ami  
Thomas F. Fleming  
Christopher T. Jagoe  
Howard S. Suh  
**KAYE SCHOLER LLP**  
425 Park Avenue  
New York, New York 10022  
(212) 836-8000  
(212) 836-8689 (facsimile)  
lbenami@kayescholer.com  
tfleming@kayescholer.com  
cjagoe@kayescholer.com  
hsuh@kayescholer.com

Donald L. Flexner  
**BOIES, SCHILLER & FLEXNER LLP**  
575 Lexington Avenue, 7th Fl.  
New York, New York 10022  
(212) 446-2300  
(212) 446-2350 (facsimile)  
dflexner@bsfllp.com

James P. Denvir  
Amy J. Mauser  
**BOIES, SCHILLER & FLEXNER LLP**  
5301 Wisconsin Avenue, N.W.  
Washington, D.C. 20015  
202-237-2727  
202-237-6131 (facsimile)  
jdenvir@bsfllp.com  
amauser@bsfllp.com

*Counsel for Defendants E.I. du Pont de Nemours and  
Company and Pioneer Hi-Bred International, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 14, 2011, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

- **Steven M. Berezney**  
steve.berezney@huschblackwell.com
- **Kurt G. Calia**  
kcalia@cov.com
- **Matthew A. Campbell**  
macampbell@winston.com
- **Scott W. Clark**  
sclark@mwe.com
- **Joseph P. Conran**  
joe.conran@huschblackwell.com
- **Todd J. Ehlman**  
tehlman@winston.com
- **Anthony J. Franze**  
Anthony.Franze@aporter.com
- **Greg G. Gutzler**  
greg.gutzler@huschblackwell.com
- **James M. Hilmert**  
jhilmert@winston.com
- **George C. Lombardi**  
glombardi@winston.com
- **Kurt A. Mathas**  
kmathas@winston.com
- **Omri E. Praiss**  
omri.praiss@huschblackwell.com
- **John J. Rosenthal**  
jrosenthal@winston.com
- **Mark A. Smith**  
markasmith@winston.com
- **Steven G. Spears**  
sspears@mwe.com,jjknapp@mwe.com
- **Tamara M. Spicer**  
tamara.spicer@huschblackwell.com,jean.melenbrink@huschblackwell.com
- **Gail J. Standish**  
gstandish@winston.com
- **Dan K. Webb**  
dwebb@winston.com

\_\_\_\_\_  
/s/ C. David Goerisch